UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

E. A. RENFROE & COMPANY, INC., **Respondent,** **and** **KIMANI ADAMS,** **an Individual.**	**Case 10-CA-171072**

RESPONDENT E. A. RENFROE'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

K. Bryance Metheny
E. Travis Ramey
BURR & FORMAN LLP
420 North 20th Street
3400 Wells Fargo Tower
Birmingham, Alabama 35203
Telephone: (205) 251-3000
Facsimile: (205) 458-5100

Attorneys for Respondent
E. A. Renfroe & Company, Inc.

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I. INTRODUCTION

Congress enacted the Federal Arbitration Act (FAA) to counter widespread hostility to arbitration. *See Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308 (2013). On multiple occasions, the Supreme Court has stated that the FAA declares a strong and emphatic national policy favoring arbitration. *See, e.g.*, *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 503 (2012); *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012). The result of the FAA and the policy it represents is this: arbitration agreements must be enforced according to their terms, even when the relevant issues are federal statutory claims, unless Congress overrides the FAA by a contrary command. *See CompuCredit*, 132 S. Ct. at 669.

Despite those commands from Congress and the Supreme Court, in *In re D.R. Horton*, 357 NLRB 2277 (2012) [*D.R. Horton I*], the Board held that employers violate Section 8(a)(1) of the National Labor Relations Act (the Act) when they require their employees to sign mutual arbitration agreements that waive class-action and collective-action procedures. In doing so, the Board held that the ability to seek class-action or collective-action certification is a substantive right protected by Section 7 of the Act. Most court decisions addressing the issue have disagreed with the Board's holding. Those courts have held that there is no Section 7 right to seek class-action or collective-action certification in arbitration. And even if there were, the FAA, which requires arbitration agreements to be enforced according to their terms, would override the Act.

In this case, E. A. Renfroe & Company, Inc. (RENFROE) required its employees to sign a mutual arbitration agreement, and Kimani Adams filed an unfair labor practice charge. The General Counsel alleged that RENFROE violated the Act by including in the arbitration agreement a provision in which employees waived the right to file or participate in class action, collective action, or representative action proceedings in litigation or arbitration. The parties

proceeded to unfair labor practice proceedings before Administrative Law Judge Keltner W. Locke (the ALJ) on a stipulated record and on the understanding that this case was merely one of many ongoing disputes regarding the application of *D.R. Horton I* and its progeny to specific employment-arbitration agreements.

Instead, the ALJ blazed his own trail and concluded that the arbitration agreements did far more than bar class or collective actions. He held that the arbitration agreements created a grievance arbitration procedure like the ones often found in collective bargaining agreements. He further held that RENFROE must maintain that procedure going forward. The ALJ concluded that all claims filed by multiple plaintiffs--or that would result in a remedy that benefitted other employees--must be heard by a court and not an arbitrator. Then, returning to the trail the Board has cut (but that courts have generally rejected), the ALJ concluded that RENFROE had violated the Act under *D.R. Horton I* theories.

For all the reasons that follow, the Board should reject all of the new theories the ALJ fashioned. The Board should also revisit its conclusions in *D.R. Horton I* and its progeny and reverse the ALJ's decision in its entirety.

II. STATEMENT OF THE FACTS

RENFROE employs project employees who provide temporary support services to insurance companies during times of disaster or claims overload. (Jt. Ex. 1 at ¶¶ 4, 6.) Although it is a Georgia corporation with its principal place of business in Birmingham, Alabama, it provides those services nationwide. (*Id.*) Currently, RENFROE's largest group of project employees is located in the State of Texas. (*Id.* at ¶ 4.)

RENFROE hired Adams as a project employee in 2012. (*Id.* at ¶ 7.) Since then, she has worked for RENFROE in Texas and in Georgia. (*Id.*) In September 2014, RENFROE deployed

her to work on a project assignment in Georgia that was expected to last until June 24, 2016. (*Id.* at ¶ 8.)

On January 15, 2016, RENFROE electronically distributed a copy of a Mutual Agreement to Arbitrate Employment-Related Disputes to its regular, full-time, Home-Office employees (Home Office Agreement). (*See id.* at ¶ 9; Jt. Ex. 2.) In that agreement, the parties agreed that they would arbitrate all "grievances, claims, complaints, disputes, or causes of action" that related to the employment relationship or the employee's performance of work. (*See* Jt. Ex. 2 at ¶ 2.) The agreement included provisions as to what claims were covered and not covered and specifically stated that it did not apply to the filing of complaints with the Board. (*See id*. at ¶¶ 3–4.) The agreement also included a provision in which the parties agreed to waive class or collective-action procedures. (*See id.* at ¶ 5.)

On February 17, 2016, RENFROE electronically distributed a copy of a Mutual Agreement to Arbitrate Employment-Related Disputes to its project employees (Project Employee Agreement). (Jt. Ex. 3.) In nearly all material ways, that agreement was identical to the Home Office Agreement. (*Compare* Jt. Ex. 2, *with* Jt. Ex. 3.) Due to a mistake made during the process by which the document was made available for electronic distribution, however, the Project Employee Agreement omitted the provision specifically stating that the mutual agreement to arbitrate did not apply to the filing of complaints with the Board. (*Compare* Jt. Ex. 2 at ¶ 4, *with* Jt. Ex. 3 at ¶ 4.)

On February 22, 2016, Adams sent an email to RENFROE indicating that she wished to renegotiate five sections of the Project Employee Agreement. (Jt. Ex. 4 at 1.) Her requested changes did not relate to the filing of complaints with the Board or the language inadvertently omitted from the agreement. (*See id.*) RENFROE declined to modify the agreement in the

manner Adams requested. (*See id.* at 2.) Adams and RENFROE exchanged additional emails regarding potential modifications of the agreement, which culminated in Adams informing RENFROE that she refused to sign the Project Employee Agreement. (*See id.* at 3–9.) Based on that refusal, RENFROE released Adams from her project assignment. (Jt. Ex. 1 at ¶ 12.) Since then, RENFROE has not assigned Adams to another project. (*Id.* at 13.)

In late March 2016, RENFROE discovered that language had been inadvertently omitted from the Project Employee Agreement. That language specifically stated that the filing of complaints with the Board was not a "covered claim" under the agreement. Therefore, on March 29, 2016, RENFROE issued to all project employees who had not already signed the Project Employee Agreement (including Adams) a Revised Project Employee Agreement that included the missing language. (*See id.* at ¶ 14; Jt. Ex. 5 at ¶ 18.) To those project employees who had already signed the Project Employee Agreement, RENFROE issued a "Clarification" stating that nothing in the agreement should be interpreted to preclude the filing of complaints with the Board. (*See* Jt. Ex. 1 at ¶ 14; Jt. Ex. 6.)

On April 5, 2016, RENFROE sent an email to Adams informing her that: (1) it had revised the Project Employee Agreement; and (2) she would be eligible for future deployments if she signed the Revised Project Employee Agreement. (*See* Jt. Ex. 1 at ¶ 15; Jt. Ex. 7.) Adams has not signed that agreement. (*See* Jt. Ex. 1 at ¶ 16.)

III. STATEMENT OF THE PROCEEDINGS

On March 4, 2016, Adams filed an unfair labor practice charge against RENFROE. (GC Ex. 1(a).) In that charge she alleged that: (1) RENFROE had maintained a mandatory arbitration agreement "that unlawfully prohibits employees from engaging in protected concerted activities"; (2) RENFROE had required employees to sign that agreement as a condition of employment; and (3) RENFROE had terminated her for refusing to sign the agreement. (*See id.*)

On April 26, 2016, the Regional Director for Region 10 issued a Complaint and Notice of hearing alleging that RENFROE had violated the Act. (GC Ex. 1(c).) Specifically, the Regional Director alleged that employees reasonably would conclude that paragraphs 2, 3, and 5 of the Project Employee Agreement precluded them from engaging in conduct protected by § 7 of the Act. (*See id.* at ¶ 4(e).) The Regional Director alleged that since at least February 17, 2016 and until March 29, 2016—the date RENFROE issued the Clarification and Revised Project Employee Agreement—employees reasonably would conclude that paragraphs 2 and 3 of the Project Employee Agreement precluded them from filing unfair labor practice charges with the Board. (*See id.* at ¶ 4(f).) The Regional Director also alleged that RENFROE terminated Adams for engaging in activities protected by the Act. (*See id.* at ¶¶ 5(a)–(c).) The Complaint said nothing about the Project Employee Agreement establishing an arbitration procedure for resolving workplace grievances that do not rise to the level of legally cognizable causes of action. (*See generally* GC Ex. 1(c).)

On May 10, 2016, RENFROE timely filed an Answer to the Complaint. (GC Ex. 1(e).) RENFROE denied it had committed any violation of the Act, and it asserted various defenses. (*See id.*)

On June 13, 2016, the ALJ conducted the Hearing on the Complaint via telephone. At that hearing, the General Counsel offered the formal documents as exhibits, (GC Exs. 1(a)–(f)), and they were admitted. The parties also offered seven joint exhibits, (Jt. Exs. 1–7),[1] and they were admitted. The parties submitted post-hearing briefs on July 18, 2016. In its post-hearing brief, the General Counsel's theory of the case was three-fold.

[1] In Joint Exhibit 1, the parties stipulated to the facts.

- First, it contended that RENFROE had violated Section 8(a)(1) because the Project Employee Agreements (unrevised and revised) precluded RENFROE project employees from pursuing class or collective claims about their working conditions against RENFROE in both litigation and arbitration. For this contention, it relied on *D.R. Horton, Inc.*, 357 NLRB 2277 (2012) [*D.R. Horton I*], *enf. denied in relevant part, D.R. Horton, Inc. v. NLRB,* 737 F.3d 344 (5th Cir. 2013) [*D.R. Horton II*]; and *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014) [*Murphy Oil I]*, *enf. denied in relevant part, Murphy Oil USA, Inc. v. NLRB,* 808 F.3d 1013 (5th Cir. 2015) [*Murphy Oil II*]; and *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016).
- Second, it contended that RENFROE had violated Section 8(a)(1) because RENFROE employees reasonably would interpret the Project Employee Agreement (until revised on March 29, 2016) as precluding them from filing unfair labor practice charges.
- Third, it contended that RENFROE had constructively discharged Adams for refusing to sign the purportedly unlawful Project Employee Agreement.

(Post Hr'g Br. of Counsel to the General Counsel [GC Br.].) Like the Complaint, the General Counsel's brief said nothing about the Project Employee Agreement establishing an arbitration procedure for resolving workplace grievances which do not rise to the level of legally cognizable causes of action. (*See generally id.*)

On August 17, 2016, the ALJ issued his decision. (Order (Aug. 17, 2016).) In that decision, the ALJ went well beyond both the Complaint and the General Counsel's theory of the case to conclude that RENFROE had violated the Act. Generally, the ALJ concluded that:

- the issues before him allowed him to rule on the legality of the Project Employee Agreement, the Revised Project Employee Agreement, and the Home Office Agreement,[2] (Order at 13 n.3.);
- RENFROE employees reasonably would believe that the Agreements' reference to "collective actions" referred to "any legal action brought by or seeking a remedy for more than one employee" instead of to actions brought under 29 U.S.C. § 216(b), (*id.* at 10–11);
- the Agreements create a mandatory grievance-arbitration procedure similar to those commonly found in collective-bargaining agreements, (*id.* at 11–18);
- the Agreements violate Section 8(a)(1) because they interfere with RENFROE employees' right to file joint "grievances" or to file "grievances" seeking a remedy for other employees, (*id.* at 18–23);
- the Agreements violate Section 8(a)(1) because they interfere with RENFROE employees' right to file joint lawsuits (as opposed to arbitration demands) or file lawsuits (as opposed to arbitration demands) seeking a remedy for other employees, (*id.* at 23–33);
- the Agreements violate Section 8(a)(1) because they preclude RENFROE employees from filing or participating in class or collective actions in both litigation and arbitration, (*id.* at 23–33);
- the Agreements violate Section 8(a)(1) because they require RENFROE employees to waive rights protected by Section 7 of the Act, (*id.* at 32);

[2] Unless a distinction between the three arbitration agreements is relevant, RENFROE refers to all three as the Agreements.

- the Agreements violate Section 8(a)(1) because RENFROE employees reasonably could construe them to preclude the exercise of conduct protected by Section 7 of the Act, (*id.* at 33–34);
- the Agreements violate Section 8(a)(1) because RENFROE employees reasonably could construe them to preclude the filing of unfair labor practice charges with the Board, (*id.* at 34–36); and
- RENFROE violated Section 8(a)(1) by constructively terminating Adams for refusing to sign the Project Employee Agreement, (*id.* at 36–37).

The ALJ concluded that the appropriate remedy was to: (1) require RENFROE to post a notice, which the ALJ attached as Appendix A, in its Birmingham, Alabama facilities and to distribute the notice by email or other electronic means by which RENFROE customarily communicates with its employees; (2) require RENFROE to send a copy of the notice to each of its clients and ask them to post it; (3) require RENFROE to reinstate Adams and compensate her for all losses she suffered; (4) require RENFROE to rescind the parts of the Agreements that the ALJ had concluded interfered with employees' rights to engage in protected concerted activity; and (5) require RENFROE to maintain in effect the grievance-arbitration procedure the Agreements purportedly created. (*Id.* at 37–38.) The ALJ entered corresponding conclusions of law and a proposed order. (*See id.* at 38–41.)

IV. ARGUMENT

The parties litigated the unfair labor practice charge on the understanding that there were three issues in dispute. First, did the two Project Employee Agreements' inclusion of a class and collective-action waiver violate the Act? Second, could the original Project Employee Agreement reasonably be construed to bar the filing of unfair labor practice charges with the

Board? Third, had RENFROE constructively discharged Adams for engaging in protected activity—refusing to sign the Project Employee Agreement?

In his Order, the ALJ went well beyond the Charge, the Complaint, and the General Counsel's theory of the case to reach issues that no party had raised, to reach conclusions for which no party had argued, and to order remedies that no party had requested and that are beyond the Board's remedial powers. His conclusions that the Agreements create a grievance-arbitration procedure similar to those often found in collective-bargaining agreements and his recommendation that RENFROE be ordered to keep that procedure in place are both irrelevant to the issues the parties actually litigated; they both exceed the Board's interpretive and remedial powers; and they are both flat wrong. No reasonable construction of the Agreements supports those conclusions, and neither does any evidence. Therefore, they should be reversed.

Further, the ALJ's conclusions regarding the issues the parties **did** litigate are also wrong. The Agreements do not infringe on Adams' Section 7 rights because, under the FAA, employers may require their employees to sign an agreement to arbitrate their employment-related claims and that agreement may include class-action and collective-action waiver. Moreover, the Agreements cannot reasonably be interpreted as barring the filing of unfair labor practice charges, and the Act does not prohibit RENFROE from requiring Adams to sign the Project Employee Agreement. Therefore, the ALJ's conclusions as to these issues should also be reversed.

A. The Board lacks authority to hold that the Agreements create a grievance-arbitration procedure similar to those typically found in collective-bargaining agreements or to require RENFROE to maintain such a procedure going forward.

The jurisdiction and power of the Board is limited. For example, the Board lacks "general jurisdiction over all alleged violations of collective bargaining agreements." *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 427 (1967). The Board's power to construe a potential violation of

a collective bargaining agreement is limited to that necessary to decide unfair labor practice cases. *See id.* at 428. The same is true of the Board's power "to adjudicate the validity or effect" of other contracts between employers and employees. *See J. I. Case Co. v. NLRB*, 321 U.S. 332, 340 (1944) (citing *Nat'l Licorice Co. v. NLRB*, 309 U.S. 350 (1940)). In short, "the Board may interpret a contract 'only so far as . . . necessary to determine' what statutory rights the party has given up by agreeing to a particular contract." *Honeywell Int'l, Inc. v. NLRB*, 253 F.3d 119, 124 (D.C. Cir. 2001) (quoting *C & C Plywood*, 385 U.S. at 428).

In that same vein, the Board's remedial power is limited to what is necessary to carry out the policies of the Act. *See Fed. Maritime Comm'n v. Pac Maritime Ass'n*, 435 U.S. 40, 70 (1978); *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 107–08 (1970). Among those fundamental policies is the freedom of contract. *See id.* Thus, the Board may not cancel contracts that are not causally derived from an unfair labor practice. *See HTH Corp. v. NLRB*, 823 F.3d 668, 680 (D.C. Cir. 2016). Similarly, the Board's remedial power does not extend to compelling parties to agree to a contract or to specific contractual terms. *See Fed. Maritime Comm'n*, 435 U.S. at 70–71; *H.K. Porter*, 397 U.S. at 108.

The ALJ's conclusions regarding the purported grievance-arbitration procedure exceed the Board's power. The ALJ fashioned that purported procedure from whole cloth under the guise of interpreting the Agreements. Doing so was unnecessary to determining what (if any) statutory rights protected by the Act Adams would have given up by signing the Project Employee Agreement. Thus, affirming the ALJ's conclusion that the Agreements created a grievance-arbitration procedure lies beyond the Board's power. *See C&C Plywood*, 385 U.S. at 427–28; *J. I. Case*, 321 U.S. at 340; *Honeywell Int'l*, 253 F.3d at 124.

Requiring RENFROE to retain the purported grievance-arbitration procedure also exceeds the Board's power. There is no policy under the Act that requires RENFROE to have a procedure to arbitrate workplace grievances unless such a procedure is the result of collective bargaining.[3] Further, by changing the terms of the Agreements and then compelling RENFROE to retain the Agreement as modified, the ALJ's proposed remedy violates the Act's policy of protecting the freedom of contract. The Board lacks power to compel RENFROE to contract on those terms. *See Fed. Maritime Comm'n*, 435 U.S. at 70–71; *H.K. Porter*, 397 U.S. at 108.

For those reasons, the ALJ's determination that the Agreements create a grievance-arbitration procedure and that RENFROE must retain that procedure should be reversed.

B. The Agreements do not create a grievance-arbitration procedure similar to those commonly found in collective-bargaining agreements.

1. The ALJ's interpretation is unprecedented and contrary to basic rules of contract construction.

The ALJ's conclusion that the Agreements create a grievance-arbitration procedure hangs on three thin threads. First, it hangs on the use of the word "grievances" in § 2 of the contract. (Order at 16.) The provision states, in relevant part:

> The Parties agree that all grievances, claims, complaints, disputes, or causes of action (collectively, 'Claims') that related in any way to the Parties' employment relationship or to the Employee's performance of work for the Employer's clients . . . shall be submitted to binding arbitration . . . .

[3] Establishing grievance procedures is a mandatory subject of bargaining. *See Ga. Power Co. v. NLRB*, 427 F.3d 1354, 1358 (11th Cir. 2005) (citing *NLRB v. Katz*, 369 U.S. 736, 743 (1962)). Thus, the Board may not simply impose grievance procedures on an employer. The ALJ's conclusions, however, impose the mandatory grievance-arbitration procedure on both RENFROE and its employees despite the lack of collective bargaining, despite powerful evidence that RENFROE had no desire or intent to create such a procedure in the Agreements, and despite the lack of any evidence that either RENFROE or a single RENFROE employee understood the arbitrations as creating a grievance-arbitration procedure. The Board should refuse to affirm such a radical redefinition of the employer–employee relationship based on the out-of-context misconstruction of a **single word** in Agreements that, read as a whole, were obviously designed to achieve a different purpose—to route lawsuits to arbitration.

(Jt. Exs. 2, 3 & 5 at ¶ 2.) Second, it hangs on broad language used in the Agreements that the ALJ misconstrued to unjustifiably broaden their scope. (Order at 15–16.) Third, it hangs on the ALJ's subjective and unsupported perception that RENFROE would garner some benefit from a grievance-arbitration procedure. (Order at 17.) Under scrutiny, however, those threads snap under the weight of the conclusion the ALJ has hung on them.

Because the Agreements list "grievances" in a series of nouns that collectively define the term "Claims," each of those words "should be assigned a permissible meaning that makes them similar." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 195 (2012). This familiar canon of construction,[4] "that words grouped in a list should be given related meaning," *see Third Nat'l Bank in Nashville v. Impac Ltd., Inc.*, 432 U.S. 312, 322 (1977), results in the rule that "a word is known by the company it keeps," *McDonnell v. United States*, 136 S. Ct. 2355, 2368 (2016) (citations omitted). The Board has long recognized this canon, *see Pre-Stressed Concrete Co. of Mont.*, 131 NLRB 27, 33 (1961), and its effect is to limit the list of general terms to the things or actions that they all cover, *see* Scalia & Garner, *supra*, at 196.

The word "grievances" appears in a list that includes the terms "claims, complaints, disputes, or causes of action." (Jt. Exs. 2, 3 & 5 at ¶ 2.) The ordinary meaning of each of those additional terms indicates that the parties intended the Agreements to apply to lawsuits or potential lawsuits, not to workplace issues that fail to rise to the level of being legally actionable. The ALJ failed to consider the ordinary meaning of the terms with which "grievances" was associated, instead assigning it the technical meaning a labor lawyer might assign to it had it

[4] The canon is sometimes referred to by the Latin phrase "noscitur a sociis," or as the "associated-words canon."

appeared in a collective-bargaining agreement. (Order at 16.)[5] What the ALJ should have done is recognize that the ordinary reasonable meaning of grievance was little different than the meaning of other terms in the list.[6] "Grievances" referred to potential disagreements between RENFROE and an employee that would or could end up being the subject of a legal cause of action. As a result, the Agreements' use of the word "grievances" is insufficient to support the out-of-context and technical meaning the ALJ assigns to it. *Cf. LaFayette Park Hotel*, 326 NLRB 824, 825 (1998) ("Rather, any arguable ambiguity arises only through parsing the language of the rule, viewing the phrase . . . in isolation, and attributing to the Respondent an intent to interfere with employee rights. We are unwilling to place such a strained construction on the language . . . ."), *enforced*, 203 F.3d 52 (D.C. Cir. 1999).

In addition to ignoring the other terms in the list that includes "grievances," the ALJ also ignored other language in the Agreements which demonstrates that the parties intended the Agreements to cover only legally cognizable causes of action. Indeed, the sentence containing the list denominates the terms therein collectively as "Claims," and states that Claims relating in any way to the employment relationship or to work performed for RENFROE's clients are to be submitted to arbitration, "whether based on contract, tort, fraud, misrepresentation, state or

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[5] The ALJ was inconsistent in his view of whether the Agreements should be interpreted from the perspective of laypersons or of "labor lawyers." He refused to give "collective action" its commonly understood legal meaning because "[p]resumably, most of [RENFROE's] employees are not labor lawyers and therefore would not reflexively associate the words 'collective action' with the Fair Labor Standards Act." (Order at 10–11.) Later in the Order, however, he insists that the term "grievance" be given its meaning as a term of art because "a labor lawyer would rarely if ever" give it a different meaning. (Order at 16.) The ALJ offered no rationale for his inconsistent reasoning.

[6] Although the ALJ found it unlikely that a labor lawyer would ever use the term "grievance" generically to mean a dispute that would result in litigation instead of specifically as a term of art, the Board has, at times, done just that. *See, e.g.*, *D.R. Horton I*, 357 NLRB at 2280 (referring to the "pursuit of workplace grievance **in court**" (emphasis added)).

federal law, or any other **legal theory**." (Jt. Exs. 2, 3 & 5 at ¶ 2 (emphasis added).) Similarly, the "Covered Claims" section of the Agreements states that the duty to arbitrate covers "all claims in a federal, state or local court or agency **under applicable federal, state or local laws**." (Jt. Exs. 2, 3 & 5 at ¶ 3 (emphasis added).) There follows a list of legally cognizable claims covered by the Agreement, which makes no reference to the type of "law of the shop" grievances typically arbitrated under collective-bargaining agreements. (*See id.*) Finally, paragraph 17 of the Agreements states: "The Parties understand and agree that this Agreement does not alter the at-will nature of their employment relationship and that either the Employer or Employee may terminate the employment relationship at any time, with or without cause or notice." (Jt. Exs. 2, 3 & 5 at ¶ 17.) The "grievance procedure" the ALJ says the Agreements created would read the express at-will language right out of the Agreements, instead requiring RENFROE to arbitrate terminations (or even routine matters like overtime assignments, training, and disciplinary issues) not giving rise to a legally cognizable claim. Indeed, the ALJ has gone far beyond interpreting or even enforcing the Agreements. Instead, he has completely rewritten them.

Second, the Board and other administrative law judges have previously examined similarly broad language (including references to "grievances") without concluding that the arbitration agreement created the type of grievance arbitration one would expect to find in a collective-bargaining agreement. For example, in *SF Markets, LLC*, 198 L.R.R.M. (BNA) 1816, 2014 WL 636358 (Feb. 18, 2014), Administrative Law Judge Ira Sandron examined whether a respondent had violated Section 8(a)(1) of the Act by maintaining a mandatory arbitration agreement that included a waiver of class, collective, and representative actions. *See id.*. at *6–7. The arbitration agreement in *SF Markets* included similarly broad provisions stating that:

- the employer and employee would arbitrate "any claim, complaint, **grievance**, cause of action, and/or other controversy . . . that arises from, relates to, or has any relationship or connection whatsoever with the Employee's employment with the Company," *id.*, slip op. at 6; and
- the requirement to arbitrate disputes "that arise out of, relate in any manner, or have any relationship whatsoever to the employment or the termination of employment of Employee" was to extend the fullest extent allowed by the law, *id.*, slip op. at 7.

Judge Sandron, however, never construed the arbitration agreement in that case as creating the type of grievance-arbitration procedures typically found in collective-bargaining agreements. Instead, Judge Sandron examined it through the lens of the Board's *D.R. Horton* line of decisions. The Board adopted Judge Sandron's decision, also without construing the agreement as creating the type of grievance-arbitration procedures the ALJ found here. *SF Markets, LLC*, 363 NLRB No. 146, at *1–2.

The language in the arbitration agreement at issue in *Murphy Oil I* was also similarly broad. *See* 361 NLRB No. 72, at *3 ("Company and Individual agree to resolve any and all disputes or claims each may have against the other which relate in any manner whatsoever as to [sic] Individual's employment . . . ."). Nor is *Murphy Oil I* alone. *See, e.g.*, *Adecco USA, Inc.*, 364 NLRB No. 9, at *1 (May 24, 2016) ("[A]ny and all disputes, claims or controversies arising out of or relating to this Agreement, the employment relationship between the parties, or the termination of the employment relationship, shall be resolved by binding arbitration . . . ."); *Bloomingdales, Inc.*, 363 NLRB No. 172, at *4 (Apr. 29, 2016).

Yet, neither in those cases nor in any other case RENFROE has located through diligent research, has the Board concluded that by placing similar language in an arbitration agreement

an employer created a grievance-arbitration procedure similar to those typically found in collective-bargaining agreements. Indeed, the ALJ cites to no decision of the Board or of another ALJ interpreting similar (or even dissimilar) language in an agreement to arbitrate employment disputes as creating collective-bargaining-like **grievance arbitration**. (*See* Order at 15–18.) The ALJ's unprecedented reading of this language is entirely inconsistent with the way the Board has previously viewed similar language.

Third, the ALJ's conclusion that "the contractual grievance resolution procedure provides unique benefits to both [RENFROE] and its employees," (Order at 17), is rank speculation based on sheer hypothetical. Neither the General Counsel nor RENFROE offered any evidence that supports a conclusion that RENFROE or RENFROE's employees would benefit from grievance arbitration. Furthermore, even if the ALJ's "hypothetical is not unrealistic," (*id.* at 17 n.7), it remains **hypothetical**. Indeed, it is far more realistic that an employer would not, absent collective bargaining, agree to pay an arbitrator's fees and expenses and have that arbitrator decide issues that do not rise to the level of a legal cause of action and that the employer ordinarily would be able to decide itself. The language in paragraph 17 of the Agreements preserving the at-will nature of the Parties' employment relationship clearly establishes that **that is the case here**. In light of that powerful evidence, and in the absence of any evidence establishing that RENFROE sought some benefit from "grievance arbitration," the ALJ's speculative finding of benefits is not only completely unsupported, but in fact is contrary to the only relevant evidence in the record.

For these three reasons, the ALJ's reading of the contract is substantively wrong. None of the Agreements create any sort of procedure for the arbitration of employee or employer "grievances" in the sense often addressed in collective bargaining. Instead, the Agreements use

the term "grievance" as one of a list of terms intended to refer to disputes that might (absent the agreement) be resolved through litigation. Other language in the Agreements directly supports that conclusion. The purpose of the Agreements is to ensure, instead, that legally cognizable claims are resolved through arbitration. The ALJ's conclusion to the contrary must be reversed.

2. The ALJ's interpretation exceeds the General Counsel's theory of the case and deprived RENFROE of its due-process rights.

Because it has been vested with "final authority" to investigate charges, to issue complaints, and to prosecute those complaints, it is well settled that the General Counsel controls the theory of the case. *See* 29 U.S.C. § 153(d); *Space Needle, LLC*, 362 NLRB No. 11, at *4 (Jan. 30, 2015); *Roadway Express, Inc.*, 355 NLRB 197, 201 n.16 (2010), *enforced*, 427 F. App'x 838 (11th Cir. 2011). Thus, any theory of violation of the Act that lies outside the General Counsel's theory of the case may not form the basis of a finding that an employer violated the Act. *Cf. Space Needle*, 362 NLRB at *4; *Roadway Express*, 355 NLRB at 201 n.16. As illustrated below, the ALJ's findings and conclusions regarding the alleged grievance-arbitration procedure fall far outside the General Counsel's theory of the case, and therefore must be reversed.

First, there are absolutely zero references to a grievance-arbitration procedure in the Charge. (*See* GC Ex. 1(a).) Indeed, the word "grievance" appears nowhere in that document. (*See id.*)

Second, there are absolutely zero references to a grievance-arbitration procedure in the Complaint. (*See* GC Ex. 1(c).) Indeed, other than a single word in a quotation from the Project Employee Agreement, the word "grievance" appears nowhere in the Complaint. (*See id.*)

Third, there are absolutely zero references to a grievance-arbitration procedure anywhere in the jointly stipulated facts. (*See* Jt. Exs. 1–7.) Indeed, other than a single word in each of the Agreements, the word "grievance" appears nowhere in the jointly stipulated facts. (*See id.*)

Fourth, there are absolutely zero references to a grievance-arbitration procedure anywhere in the General Counsel's post-hearing brief. (*See* GC Br.) Indeed, other than a single word in a quotation from the Project Employee Agreement, the word "grievance" appears nowhere in the General Counsel's brief. The brief is absolutely bereft of any argument that the Agreements created a grievance-arbitration procedure similar to the ones commonly found in collective-bargaining agreements or any argument that limitations on such a procedure formed the basis for the General Counsel's theory of how RENFROE purportedly violated the Act. The General Counsel's brief does not propose a conclusion of law that the Agreements created a grievance procedure, and the General Counsel's proposed order does not so much as mention a grievance procedure, much less contain language directing RENFROE to maintain such a procedure going forward. Likewise, the General Counsel's proposed notice to employees says absolutely nothing about a grievance procedure.

The very first time that anyone involved with this case raised any contention that the Agreements created a grievance-arbitration procedure similar to the ones commonly found in collective-bargaining agreements was when the ALJ raised it on page 13 of his Order deciding the case. (*See* Order at 13.) Notably, there is no reference to such a procedure in the list of eight issues to be resolved that the ALJ laid out on pages 4 and 5 of the Order. In deciding that the Agreements created such a procedure, the ALJ greatly exceeded the General Counsel's theory of the case, which **never** had included "grievance arbitration" in any way, shape, or form. In formulating his own, independent theory of how RENFROE purportedly had violated the Act,

the ALJ usurped the General Counsel's "final authority" to control the theory of the case and its role as prosecutor of the Complaint. *Cf. Space Needle*, 362 NLRB at *4; *Roadway Express*, 355 NLRB at 201 n.16. Thus, not only is the ALJ's interpretation of the Agreements wrong, it is an improper basis from which to conclude that RENFROE violated the Act.

Additionally, raising the issue of "grievance arbitration" for the first time in the ALJ's Order violated RENFROE's due process rights. "The fundamental elements of due process are notice and an opportunity to be heard." *Lamar Cent. Outdoor*, 343 NLRB 261, 265 (2004). "To satisfy the requirements of due process, an administrative agency must give the party charged a clear statement of the theory on which the agency will proceed with the case. Additionally, an agency may not change theories in midstream without giving respondents reasonable notice of the change." *Id.* (citation omitted).

Because the issue of "grievance arbitration" was raised for the first time in the ALJ's Order, RENFROE received no notice that it could be held liable on that theory. Nor was the issue litigated at the hearing. Thus, RENFROE received insufficient notice to afford it an opportunity to prepare a defense to the ALJ's conclusion that the Agreements create a mandatory grievance-arbitration procedure. *See Graymont PA, Inc.*, 364 NLRB No. 37, at *6 (June 29, 2016) (citing *Pergament United Sales, Inc. v. NLRB*, 920 F.2d 130, 135 (2d Cir. 1990)).

Had RENFROE received notice of the contention that the Agreements created a grievance-arbitration procedure, it would not have relied solely on the joint stipulation of facts, at least not in its current form. Instead, it would have sought to present evidence regarding the appropriate interpretation of the Agreements, including evidence of RENFROE, Adams', and other RENFROE employees' understanding of the terms. It also would have sought to present additional argument to the ALJ regarding the correct interpretation of the Agreements. Further, it

would have sought to introduce other contracts that **did** create grievance-arbitration procedures to demonstrate the differences between the language used in those contracts and the language used in the Agreements at issue in this case.

Because it received no notice of the contention that the Agreements created a grievance arbitration procedure, however, RENFROE did none of those things. The deprivation of the opportunity to do them denied RENFROE due process. That deprivation is sufficient reason to reverse the ALJ's conclusions on that issue. At minimum, it requires the ALJ's Order to be vacated and the matter remanded for additional proceedings to allow RENFROE to mount the defense of which it was deprived.

C. The provision of the Agreements waiving class and collective-action procedures does not infringe on employees' Section 7 rights.

1. Employers may require that employees arbitrate their claims, including claims brought by multiple plaintiffs or claims that seek a remedy for other employees.

There is no dispute that employers may, as a condition of employment, require employees to sign agreements that mandate arbitration of employment-related disputes. *See Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1367 (11th Cir. 2005) ("[C]ompulsory arbitration agreements are now common in the workplace, and it is not an unlawful employment practice for an employer to require an employee to arbitrate, rather than litigate, rights under various federal statutes, including employment-discrimination statutes."); *O'Charley's Inc.*, 28 NLRB AMR 38091, 2001 WL 36368393 (Apr. 16, 2001) ("The Agreement only restricts the choice of forum to arbitration instead of a court proceeding. This limitation is lawful."). The ALJ himself agreed that "[n]o one here disputes than an employer can condition employment on a worker's signing a waiver of the right to file a lawsuit on her own behalf." (Order at 23.) Nevertheless, the Board continues to dispute whether employer–employee arbitration agreements

may include provisions requiring employees to waive their ability to seek class or collective-action certification. Even a cursory review of RENFROE's or the General Counsel's post-hearing briefs reveal that both parties understood that dispute to be the principal issue in this case.

Yet a large portion of the ALJ's Order is dedicated to concluding that the Agreements do more than require RENFROE employees to waive the right to pursue class or collective-action certification. In doing so, the ALJ focused heavily on two phrases in the Agreements: "collective action" and "representative claims." The relevant portion of the Agreements provides:

> 5. Waiver of Class Action and Representative Action Claims. Except as otherwise required under applicable law, the Parties agree that class action and **collective action** procedures are waived, and shall not be asserted, nor will they apply, in any arbitration (or dispute adjudicated in any forum) pursuant to this Agreement. Employee agrees that Employee will not serve as a representative member of any class action or **collective action** claim or procedure instigated by another person. The Parties also agree that, to the extent permitted by law, they will be precluded from asserting in arbitration, or any other forum, any **representative claims**. This Waiver of Class Action and Representative Action Claims and the Waiver of Trial by Jury in Section 5 of this Agreement shall also apply to all claims by Employee against Employer's clients as well as the clients' officers, directors, supervisors, managers, employees and agents.

(Jt. Exs. 2, 3 & 5 at ¶ 5 (emphasis added).) The ALJ concluded that the term "collective action referred to any legal action brought by or seeking a remedy for more than one employee" instead of to the collective action procedure created by 29 U.S.C. § 216(b). (Order at 11.) The ALJ coupled that conclusion to the language precluding "representative claims" to reach the conclusion that the Agreements barred employees from filing together joint claims or from filing claims where the employee simultaneously seeks a remedy for herself and other employees. (*See* Order at 19, 27, 29–30.)

There are significant problems with the ALJ's interpretation of the Agreements. First, his definition of "collective actions" is unsupported by the language of Section 5 of the contracts when taken in its appropriate context. The provision discusses waiver of "collective action

procedures" and "collective action" claims. (Jt. Exs. 2, 3 & 5 at ¶ 5.) That the discussion of collective-action procedures is referring to the procedure created by 29 U.S.C. § 216(b) is made even more clear because the term repeatedly accompanies the term "class action," which no one disputes is referring to the procedures defined in Federal Rule of Civil Procedure 23. In addition, the Board has looked at arbitration agreements that include collective-action waivers literally dozens of times and apparently never has concluded that the term "collective action" means anything other than the procedure created by 29 U.S.C. §216(b). *See, e.g.*, *Bristol Farms*, 364 NLRB No. 34 (July 6, 2016); *Cal. Commerce Club, Inc.*, 364 NLRB No. 31 (June 16, 2016); *SJK, Inc.*, 364 NLRB No. 29 (June 16, 2016); *Adriana's Ins. Servs., Inc.*, 364 NLRB No. 17 (May 31, 2016); *Lincoln E. Mgmt. Corp.*, 364 NLRB No. 16 (May 31, 2016). The ALJ's overbroad interpretation of "collective action" to mean "any legal action brought by or seeking a remedy for more than one employee" is simply wrong.

Second, whether the Agreements reasonably can be construed as barring two employees from jointly filing claims seeking remedies for themselves is irrelevant. Even in cases where arbitration agreements have required individual arbitration, the Board has not found a violation of the Act based on the rationale on which the ALJ relies. *See, e.g.*, *CVS RX Servs., Inc.*, 363 NLRB No. 180 (May 4, 2016). Instead, it has relied on the *D.R. Horton I* analysis. *See CVS RX Servs., Inc.*, 363 NLRB No. 180.

Third, the inclusion of the phrase "representative action" does not preclude employees from simultaneously seeking a remedy for themselves individually that would also benefit their co-workers. Instead, it requires only that employees proceed on their own behalf when they seek that remedy. On multiple occasions, the Board has examined similar language, but it apparently never has concluded that including the term "representative action" along with "class action" and

"collective action" somehow alters the *D.R. Horton I* analysis regarding removing lawsuits to arbitration. *See, e.g*, *Jack in the Box, Inc.*, 364 NLRB No. 12 (May 24, 2016); *Adecco USA, Inc.*, 364 NLRB No. 9 (May 24, 2016); *Acuity Specialty Prods., Inc.*, 363 NLRB No. 192 (May 16, 2016); *Securitas Sec. Servs. USA, Inc.*, 363 NLRB No. 182 (May 11, 2016); *CVS RX Servs., Inc.*, 363 NLRB No. 180 (May 4, 2016).

2. Employers may require that employees waive class or collective action procedures in litigation and arbitration.

In *D.R. Horton I*, the Board held that requiring individual arbitration of employment-related claims and excluding any access to class or collective-action procedures interfered with Section 7 rights. *See* 357 NLRB at 2279. The basic reasoning of that decision, and of its progeny, is that Section 7 rights include the right to "join together to bring employment-related claims on a classwide or collective basis in court or before an arbitrator." *Id.*

As the overwhelming majority of courts that have considered the issue have concluded, *D.R. Horton I* and its progeny are wrongly decided. Section 7 does not import procedures from other statutes or rules and convert them into substantive rights. Furthermore, the FAA requires that arbitration agreements like the Agreements be enforced according to their terms. Based on this overwhelming rejection, the Board should repudiate *D.R. Horton I* and recognize that employers may include class and collective-action waivers in mandatory arbitration agreements without violating the Act.

a. Section 7 does not protect the procedural right to bring or participate in class or collective actions.

When the Board decided that Section 7 protects the right to bring or participate in class or collective actions, it analogized those "rights" to the right to bring good faith, non-malicious lawsuits or administrative complaints. *See D.R. Horton I*, 357 NLRB at 2278 & n.4. The appropriate analysis, however, is whether the Act protects the ability to access class-action and

collective-action procedures.[7] Those procedures are governed by specific statutory provisions or procedural rules that exist **outside the Act**. *See* 29 U.S.C. § 216(b) (FLSA); 29 U.S.C. § 626(b); Fed. R. Civ. P. 23 (class actions). Federal courts, including the Supreme Court, have made clear that there is **no substantive right** to access those procedures; any such right is procedural only. *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims."); *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) (concluding no right to class procedures existed under the ADEA despite the statute explicitly providing for class procedures); *see also Italian Colors Rest.*, 133 S. Ct. at 2309 (reiterating that Rule 23 does not "establish an entitlement to class proceedings for the vindication of statutory rights").[8]

The authorities the Board cited in *D.R. Horton I* do not stand for the proposition that Section 7 protects access to certain procedures. Instead, the clear weight of court authority holds

[7] The ALJ misinterpreted RENFROE's discussion of accessing class or collective-action procedures. (*See* Order at 24, 26–28 & nn. 12 & 13.) RENFROE recognizes that the Board has not held that Section 7 grants employees the right to proceed as a class or in a collective action. Instead, the Board has held that employees have a right to access the class or collective action certification procedures—the right to "pursue" a class or collective action. *See, e.g.*, *Cal. Commerce Club, Inc.,* 364 NLRB No. 31, at *1 n.2 (June 16, 2016). It is this holding—that the Act creates a right to ask for class or collective-action certification—that RENFROE challenges.

[8] *See also Walthour v. Chipio Windshield Repair, LLC* 745 F.3d 1326, 1336 (11th Cir. 2014) (holding that there is no non-waivable, substantive right to bring a collective action); *Sutherland v. Ernst & Young, LLP*, 726 F.3d 290, 297 & n.8 (2d Cir. 2013) (concluding that the collective action is a waivable procedural mechanism); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052–53 (8th Cir. 2013) (concluding that, even if there was a "right" to class proceedings under the FLSA, the right was waivable); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004) (rejecting the plaintiffs' claim that their inability to proceed collectively deprived them of a substantive right to proceed under the FLSA because, in *Gilmer*, the Supreme Court rejected similar arguments regarding the ADEA); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002) ("Adkins points to no suggestion in the text, legislative history, or purpose of the FLSA that Congress intended to confer a nonwaivable right to a class action under that statute. His inability to bring a class action, therefore, cannot by itself suffice to defeat the strong congressional preference for an arbitral forum.")

that any "right" to access class-action or collective-action procedures is, at most, a waivable procedural right. Section 7 does not protect the pursuit of class-action and collective-action certification, and an employer that requires an employee to sign an agreement to disclaim pursuit of those certifications does not violate Section 8(a)(1).

b. The Board's decisions in *D.R. Horton I* and its progeny are inconsistent with the Federal Arbitration Act and with court precedent.

The FAA provides that "[a] written provision in any maritime transaction or contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. It also establishes that there is "a liberal federal policy favoring arbitration agreements." *Moses H Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *see also, e.g.*, *Gilmer*, 500 U.S. at 25. That policy favoring arbitration applies equally to arbitration provisions containing class-action waivers. *See, e.g.*, *Italian Colors*, 133 S. Ct. at 2309 (finding that the FAA's mandate to enforce arbitration agreements was not "overridden by a contrary congressional command" because the statutes at issue made no mention of class arbitration); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343–52 (2011); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010) (holding that class arbitration is permissible under the FAA only when "there is a contractual basis for concluding that the party agreed to do so").

Thus, the FAA requires the enforcement of arbitration agreements containing class waivers. *Concepcion*, 563 U.S. at 343–52. In *Concepcion*, the Supreme Court upheld a class-action waiver in an arbitration agreement, striking down a state law conditioning enforcement of an arbitration agreement on the availability of classwide arbitration. *See id.* at 352. It held that the FAA preempts any state law that prohibits class waivers in arbitration agreements. *See id.*

The Court reasoned that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at 344. The Court concluded that the FAA establishes a strong federal policy in favor of enforcing arbitration agreements according to their terms, which includes waivers of access to class or collective relief in arbitration. *Id.* at 339.

The Supreme Court has reaffirmed those principles since the Board's decision in *D.R. Horton I*. *See, e.g.*, *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) ("[The FAA]" requires courts to enforce agreements to arbitrate according to their terms.") The principle applies "even when the claims at issue are federal statutory claims, unless the FAA's mandate has been overridden by a contrary congressional command." *Id.* (citations omitted).

Thus, the FAA's policy in favor of arbitration *could be* overridden were there a contrary congressional command in the Act to do so. However, that Congress intended to issue such a command must be clear from the language of the statute, the legislative history, or some inherent conflict between arbitration and the statute's underlying purpose. *See Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226–27 (1987); *see also CompuCredit*, 132 S. Ct. at 670–73.

Courts of appeal have rejected the conclusion that the Act contains a congressional command for it to contradict and override the FAA. *See, e.g.*, *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013) [*D.R. Horton II*]; *Owen*, 702 F.3d at 1052–53, 1055. There is nothing in the Act's text that explicitly indicates a "congressional intent to override the FAA." *D.R. Horton II*, 737 F.3d at 360. And there is nothing in the Act's legislative history that indicates a congressional intent to override the FAA. *See id.*; *see also id.* at 362.

Furthermore, precedent is clear that the statutes or rules creating the collective-action and class-action procedures do not contain contrary congressional commands. *See Italian Colors*,

133 S. Ct. at 2309–10 (finding no contrary congressional command in Rule 23); *Gilmer*, 500 U.S. at 35 (finding no contrary congressional command in the ADEA); *Walthour*, 745 F.3d at 1334 (finding no contrary congressional command in the FLSA); *Sutherland*, 726 F.3d at 296–97 (concluding that the FLSA contains no contrary congressional command that would prevent enforcing collective-action waivers). As there is no contrary congressional command overriding the FAA in the provisions creating the procedures, it is absurd to find some implicit congressional command in an unrelated statute that seeks to import those procedures.

Alternatively, the FAA's policy in favor of arbitration could be overridden by applying the statute's "saving clause," which permits courts to invalidate an arbitration agreement "upon such grounds as exist in law or in equity for the revocation of any contract." *See* 9 U.S.C. § 2. The Supreme Court has explained that the FAA's "saving clause permits arbitration agreements to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, **but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue**." *Concepcion*, 563 U.S. at 339 (emphasis added). Further, a rule that has a disproportionate impact on arbitration agreements is inconsistent with the saving clause. *See id.* at 341–42.

In *Concepcion*, the Supreme Court made clear that a rule requiring class-action or collective-action procedures to be available falls outside the saving clause. *See id.* at 341–51. A rule mandating access to those procedures, which are complex and often cumbersome, is contrary to the "overarching purpose" of the FAA—to provide a more streamlined, cheaper, less formal, and faster dispute-resolution method. *See id.* at 344. "[C]lass arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate a procedural morass than final judgment." *Id.* at 348.

Under *Concepcion*, the Board's decision that employees must be allowed to seek class and collective-action certification is inconsistent with the FAA because that rule has a disproportionate impact on arbitration agreements. The rule disfavors arbitration. *See D.R. Horton II*, 737 F.3d at 359. It conditions the arbitration agreement's enforceability on whether those procedures are available. *See id.* at 336. In doing so, it imposes "an actual impediment to arbitration and violates the FAA." *Id.* at 360. For the same reason the state law requiring class-action procedures was invalid in *Concepcion* and fell outside the saving clause, the rule the Board created in *D.R. Horton I* is invalid and falls outside the saving clause.

For these reasons, the Board's decisions in *D.R. Horton I* and its progeny are inconsistent with Supreme Court decisions interpreting the FAA. The FAA requires courts to enforce the Agreements according to their terms. The Act does not contain a contrary congressional command that would eliminate that obligation, and the saving clause is inapplicable. Therefore, the FAA's requirement governs.

The Agreements are legal, valid, and enforceable. It was not an unfair labor practice for RENFROE to require project employees to sign it. The ALJ's decision to the contrary should be reversed.

c. The Board should acquiesce to the weight of authority rejecting its position in *D.R. Horton I* or, alternatively, should hold this proceeding in abeyance pending review by the United States Supreme Court.

Since the Board decided *D.R. Horton I*, multiple courts of appeals have rejected its reasoning. Two courts of appeals (the Fifth Circuit and the Eighth Circuit) have expressly refused to enforce Board orders resulting from unfair labor practice proceedings alleging that an arbitration agreement that contained a class and collective-action waiver violated the Act. *See Cellular Sales of Mo., LLC v. NLRB*, 824 F.3d 772 (8th Cir. 2016); *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015) [*Murphy Oil II*]; *D.R. Horton II*, 737 F.3d 344. Counsel for

RENFROE has located no decision of any court of appeals enforcing a Board order holding that an arbitration agreement containing a class or collective-action waiver violates the Act.

Other courts of appeals have enforced arbitration agreements despite challenges that they are unlawful under the reasoning set out in the Board's decision in *D.R. Horton I*. *See Patterson v. Raymours Furniture Co.*, No. 15-2820-cv, 2016 WL 4598542, at *2–3 (2d Cir. Sept. 2, 2016); *Sutherland*, 726 F.3d at 297 n.8; *Owen*, 702 F.3d at 1053–54. *But see Morris v. Ernst & Young, LLP*, No. 13-16599, 2016 WL 4433080, at *5 (9th Cir. Aug. 22, 2016); *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1161 (7th Cir. 2016).

These courts of appeals rejecting *D.R. Horton I* hardly stand alone. Many district court have rejected *D.R. Horton I*.[9] State courts have unanimously rejected *D.R. Horton I* as well. *See Tallman v. Eighth Jud. Dist. Ct.*, 359 P.3d 113, 122–23 (Nev. 2015); *Iskanian v. CLS Transp. L.A., LLC*, 327 P.3d 129, 303–05 (Cal. 2014), *cert. denied,* 135 S. Ct. 1155 (2015); *Neary v. Mastec N. Am.*, Inc., No. 15-cv-2655, 2016 WL 2968336, at *3 (Mass. Super. Ct. May 9, 2016). The judicial rejection of the Board's reasoning in *D.R. Horton I* illustrates that the decision was ill-considered and should be overturned in this case.

If the Board is disinclined to overturn its *D.R. Horton I* line of decisions, it should consider staying this case or holding it in abeyance pending potential action by the United States Supreme Court. No fewer than three petitions for certiorari, including one filed by the General Counsel, are currently pending before the Court. *See Patterson v. Raymours Furniture Co.*, No. 16-388, 2016 WL 5390666 (Sept. 22, 2016); *NLRB v. Murphy Oil USA, Inc.*, No. 16-307, 2016 WL 4761717 (Sept. 9, 2016) [*Murphy Oil III*]; *Epic Sys. Corp. v. Lewis*, No. 16-285, 2016 WL

[9] *See, e.g.*, *Pollard v. ETS PC, Inc.*, — F. Supp. 3d —, No. 16-cv-0097, 2016 WL 2983530, at *18 (D. Colo. May 12, 2016); *Bell v. Ryan Transp. Serv., Inc.*, — F. Supp. 3d —, No. 15-9857, 2016 WL 1298083, at * 7–8 (D. Kan. Mar. 31, 2016); *Diaz v. Mich. Logistics Inc.*, — F. Supp. 3d —, No. 15-1415, 2016 WL 866330, at *5 (E.D.N.Y. Mar. 1, 2016).

4611259 (Sept. 2, 2016). As the Board would, of course, acquiesce to a decision by the Supreme Court, principles of efficiency weigh in favor of waiting for the Supreme Court to decide these issues before reaching any conclusion as to the outcome of this case.

D. No reasonable employee would conclude that the Agreements preclude the filing of unfair labor practice charges.

Section 7 of the Act guarantees employees the right "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." See 29 U.S.C. § 157. To determine whether an employer rule interferes with restrains, or coerces employees in the exercise of their rights, the proper consideration is whether the rule reasonably tends to chill employees in their exercise of those rights. *See LaFayette Park Hotel*, 326 NLRB at 825. When making that decision, the Board must give the rule a reasonable reading and not presume improper interference. *See Martin Luther Mem'l Home, Inc.*, 343 NLRB 646, 646 (2004). If, as here, the rule does not expressly restrict Section 7 activities, the rule is unlawful only if: (1) "employees would reasonably construe the language to prohibit Section 7 activity"; (2) the rule was a response to union activity; or (3) the employer has applied the rule to restrict Section 7 rights. *Id.* at 647. The General Counsel bears the burden to prove interference, restraint, or coercion that violates the Act. *See Centex Indep. Elec. Contractors Ass'n, Inc.*, 344 NLRB 1393, 1402–03 (2005) ("[E]very unfair labor practice hearing begins with the presumption that the respondent has obeyed the law, and the General counsel bears the burden of proving violative conduct by a preponderance of the evidence."); *see also NLRB v. Fluor Daniel, Inc.*, 161 F.3d 953, 965 (6th Cir. 1998) ("The General Counsel of the NLRB bears the burden of proof in unfair labor practice cases.").

Here, although the ALJ failed to address the issue, there was no evidence or argument from the General Counsel that RENFROE promulgated the Agreements in response to union

activity. Instead, the ALJ concluded that RENFROE employees reasonably would construe the Agreements as covering unfair labor practice charges. (*See* Order at 35.) The ALJ also concluded that requiring employees to sign the Agreements interfered with their protected rights. (*See id.* at 36.)

In deciding whether the Agreements are lawful, it is improper to read them as prohibiting protected activity just because they could be interpreted that way. *See Martin Luther Mem'l Home*, 343 NLRB at 647 ("Where, as here, [an employer] rule does not refer to Section 7 activity, we will not conclude that a reasonable employee would read the rule to apply to such activity simply because the rule could be interpreted that way."). Nor is it proper to find interference based on: (1) vagueness and ambiguity resulting from parsing language in an employer policy; (2) interpretations of isolated portions of an employer policy; (3) or from attributing to the employer an intent to interfere with protected rights. *See S.T.A.R., Inc.*, 347 NLRB 82, 83 n.3 (2006) ("When determining a rule's reasonable constructions, the Board must refrain from reading particular phrases in isolation and must not presume improper interference with employee rights."); *Martin Luther Mem'l Home*, 343 NLRB at 646 (same); *LaFayette Park Hotel*, 326 NLRB at 825 ("Rather, any arguable ambiguity arises only through parsing the language of the rule, viewing the phrase . . . in isolation, and attributing to the Respondent an intent to interfere with employee rights. We are unwilling to place such a strained construction on the language . . . ."). The ALJ's conclusion that the Agreements are unlawful can only be based on those impermissible rationales.

Speculation that paragraphs 2 and 3 of the Agreements could be interpreted to preclude the filing of unfair labor practice charges is insufficient to support a Section 8(a)(1) violation. *See Adtranz ABB Daimler-Benz Transp. N.A., Inc. v. NLRB*, 253 F.3d 19, 28 (D.C. Cir. 2001)

("[T]he NLRB could not declare a policy to be facially unlawful based upon 'fanciful' speculation, but rather had to consider the context in which the rule was applied and its actual impact on employees."); *Aroostok Cty. Reg'l Ophtalmology Ctr. v. NLRB*, 81 F.3d 209, 213 (D.C. Cir. 1996) (discussing fanciful speculation as an insufficient basis for decision). There is absolutely no evidence in the record indicating that Adams or other RENFROE employees interpreted the Agreements to bar the filing of unfair labor practice charges with the Board. There is absolutely no evidence in the record indicating that Adams or other RENFROE employees have declined to file charges with the Board or other governmental agencies or that they believed they were unable to do so because the Agreements preclude it. In the absence of any such evidence, the ALJ's conclusion was mere "fanciful speculation." *See Adtranz*, 253 F.3d at 28; *Aroostok Cty.*, 81 F.3d at 213. He impermissibly interpreted the Agreements as susceptible to being construed as barring the filing of unfair labor practice charges just because they could be interpreted that way as a result of parsing the language of isolated portions of the Agreements and assuming RENFROE intended to interfere with employees' rights. *See S.T.A.R*, 347 NLRB at 83 n.3; *Martin Luther Mem'l Home*, 343 NLRB at 646-47; *LaFayette Park Hotel*, 326 NLRB at 825. That is not enough to support the ALJ's conclusions.

This is especially true in light of other language that is in the Agreements or that is not in the Agreements. Paragraphs 2 and 3 of the Agreements never mention unfair labor practice charges, the Board, or the Act. (Jt. Ex. 3 at ¶ 2–3.) Furthermore, they expressly exclude any "claims that, as a matter of law, the Parties cannot agree to arbitrate" from the scope of items that must be arbitrated. (*Id.* at ¶ 4.) In light of the complete absence of any direct discussion of the unfair labor practice charges, the Board, or the Act and the express exclusion of claims that are

not arbitrable, any construction of the Agreements as barring the filing of unfair labor practice charges is unreasonable.

Reasonable employees would not construe the language of the Agreements to bar them from filing unfair labor practices charges with the Board. Therefore, the Agreements do not violate Section 8(a)(1).

E. It was lawful for RENFROE to require Adams to sign the Project Employee Agreement.

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in section 157." 29 U.S.C. § 158. The Complaint alleged and the ALJ concluded that RENFROE violated Section 8(a)(1) by cancelling Adams' deployment and refusing to redeploy her unless she signed the Revised Project Employee Agreement. (GC Ex. 1(c) at ¶ 5(a)–(c); Jt. Ex. 1 at ¶¶ 11–13; Order at 36–37.) The ALJ concluded that the Project Employee Agreement and the Revised Project Employee Agreement both interfered with Adams' Section 7 rights. (Order at 37.) Therefore, he concluded that Adams was engaging in protected concerted activity when she refused to sign them and that RENFROE had terminated her for engaging in those activities and to discourage other employees from engaging in those activities. (*Id.*)

For the reasons set forth above, the ALJ's conclusions were false. Neither the Project Employee Agreement nor the Revised Project Agreement interfered with Adams' Section 7 rights.[10] Therefore, RENFROE was free to condition continued assignments on Adams signing

[10] The ALJ's discussion of a potential chilling effect on other employees is pure speculation. The General Counsel presented no evidence that RENFROE's decision to release Adams from her project assignment had any effect on any other employee. In fact, the General Counsel presented no evidence that other employees even knew why Adams was released.

those agreements. *See generally O'Charley's Inc.*, 28 NLRB AMR 38091, 2001 WL 36368393 (Apr. 16, 2001).

Further, to the extent the ALJ based his conclusion on the theory that the Agreements would lead reasonable employees to conclude they are barred from filing unfair labor practice charges, his conclusion suffers from a fatal flaw: lack of causation. Generally, to sustain a claim of unlawful discharge, the General Counsel must show that protected activity motivated the employer's decision to discharge the employee. *See Aljoma Lumber, Inc.*, 345 NLRB 261, 281 (2005) (discussing the causation requirement from *Wright Line*, 251 NLRB 1083 (1980), *enforced*, 662 F.2d 889 (1st Cir. 1981)).

In the emails exchanged between Adams and RENFROE, Adams made clear that she objected to several provisions in the Project Employee Agreement, but she never objected to the agreement on the basis that it precluded her from filing unfair labor practice charges. (*See generally* Jt. Ex. 4.) Therefore, had RENFROE included in the Project Employee Agreement the provision expressly excluding from the agreement's scope any complaints filed with the Board (as it would have done but for a mistake), Adams would have still objected to the Project Employee Agreement and refused to sign it. RENFROE would have then taken the same actions it took—cancelling her deployment and refusing to redeploy her. As a result, any allegedly protected conduct in refusing to sign the Project Employee Agreement because it failed to expressly exclude from its scope the filing of charges with the Board cannot have been a motivating factor in RENFROE's decision to cancel Adams' project assignment and to refuse future assignments to her unless she signed the Project Employee Agreement or the Revised Project Employee Agreement.

For all these reasons, the Act permitted RENFROE to require Adams to sign the Project Employee Agreement and the Revised Project Employee Agreement. The ALJ's conclusion to the contrary should be reversed.

V. CONCLUSION

By enacting the FAA, Congress expressed a strong national policy favoring arbitration. To effectuate that policy, the Supreme Court has made clear that arbitration agreements are to be enforced according to their terms unless Congress overrides that requirement through a contrary congressional command.

Because the Act contains no such contrary congressional command, the FAA requires the Board to enforce the Agreements. Further, the Agreements are not inconsistent with the Act, and nothing in the Act prohibited RENFROE from requiring Adams to sign the Project Employee Agreement and the Revised Project Employee Agreement. The ALJ also erred in concluding that the Agreements established a grievance procedure extending to disputes not rising to the level of a legally cognizable cause of action, and even if the Agreements had established such a procedure, the Board lacks the power to require RENFROE to maintain it.

For all of the foregoing reasons, the ALJ's Order should be reversed, and the Complaint should be dismissed. At a minimum, the ALJ's Order should be vacated and this matter should be remanded for further proceedings that are consistent with RENFROE's right to due-process.

s/ K. Bryance Metheny
K. Bryance Metheny
E. Travis Ramey

Attorneys for Respondent
E. A. Renfroe & Company, Inc.

OF COUNSEL:
BURR & FORMAN LLP
420 North 20th Street
3400 Wells Fargo Tower
Birmingham, Alabama 35203
Telephone: (205) 251-3000
Facsimile: (205) 458-5100
bmetheney@burr.com
tramey@burr.com

CERTIFICATE OF SERVICE

I certify that on October 5, 2016, a copy of the foregoing document was filed with NLRB Executive Secretary via the National Labor Relations Board's electronic filing system, and served a copy of the foregoing by electronic mail upon the following:

Claude T. Harrell, Jr., Regional Director
National Labor Relations Board, Region 10
233 Peachtree Street, NE
1000 Harris Tower
Atlanta, Georgia 30303
Email: claude.harrell@nlrb.gov

Matthew J. Turner, Counsel for the General Counsel
National Labor Relations Board, Region 10
233 Peachtree Street NE
1000 Harris Tower
Atlanta, Georgia 30303
Email: matthew.turner@nlrb.gov

Kimani Adams
345 Twin Lakes Drive
Gray, Georgia 31032-5033
Email: kimani.adams01@gmail.com

s/ K. Bryance Metheny
OF COUNSEL